88-1874

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, and UNITED TRANSPORTATION UNION,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, and FRVR CORPORATION,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
RICHARD S. EDELMAN

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Cross-Petitioners

* Counsel of Record

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QUESTIONS PRESENTED

1. Did either the Interstate Commerce Commission or the court of appeals have jurisdiction to decide whether the Interstate Commerce Act operated to relieve a rail carrier of its Railway Labor Act obligations or to restore to the federal courts jurisdiction which the Norris-LaGuardia Act has withdrawn in cases arising from a labor dispute?

2. Does the Interstate Commerce Commission's jurisdiction over economic transactions concerning railroads relieve the rail carriers participating in such transactions of their obligations under the Railway Labor Act to give notice and to bargain for the protection of employees when the Commission has concluded that employee protections are not required to be imposed as an exercise of its discretion under Section 10901 of the Interstate Commerce Act?

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INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
CHICAGO & NORTH WESTERN TRANSPORTATION
COMPANY, and FRVR CORPORATION,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] and the United Transportation Union [hereinafter, "UTU"] [1] respectfully request

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[1] RLEA is an unincorporated association of the Chief Executive Officers of seventeen (17) labor organizations which collectively represent most rail employees in this Country. A list of RLEA's member organizations is reproduced herein as Appendix B. The Chief Executive Officers of cross-petitioner UTU and its Yardmasters Department were members of RLEA until mid-April 1989. Although no longer a member organization of RLEA, the UTU is still participating in this proceeding, and therefore, it has been listed in the caption as a separate cross-petitioner.

that if this Court grants the petition in No. 88-1706, *Chicago & North Western Transportation Co. v. RLEA*, it also grant this cross-petition for a writ of certiorari to review the other aspects of the judgment of the United States Court of Appeals for the Eighth Circuit in *RLEA v. Interstate Commerce Commission*, 861 F.2d 1082 (8th Cir. 1988).

OPINIONS BELOW

The opinion of the court of appeals is reported at 861 F.2d 1082 and is reproduced at pages 1a-3a of the appendix to the petition in No. 88-1706 by the Chicago & North Western Transportation Company [hereinafter, "C&NW"] and FRVR Corporation for a writ of certiorari to review that judgment [hereinafter, "C&NW Petition"]. That decision clarified, and then affirmed as clarified, the unreported decision of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in ICC Finance Docket No. 31205, *FRVR Corp.—Exemption Acquisition and Operation—Petition For Clarification*, served January 29, 1988; that ICC decision is reproduced in the appendix to the C&NW Petition at 4a-23a.

JURISDICTION

The judgment of the court of appeals, which is reproduced in the C&NW Petition at 24a, was entered on November 21, 1988, and petitioner RLEA filed a timely petition for rehearing, which was denied on January 30, 1989 (C&NW-Petition at 26a). Petitioners C&NW and FRVR served, by hand delivery on April 20, 1989, copies of their petition for a writ of certiorari to review the Eighth Circuit's decision. This cross-petition is timely under Rule 19.5 of the Rules of this Court. Cross-petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the relationship of Sections 10505 and 10901 (49 U.S.C. §§ 10505, 10901) to Sections 2 First, 2 Seventh, 5 First, and 6 of the Railway Labor Act (45 U.S.C. §§ 152 First, 152 Seventh, 155 First and 156). Those statutory provisions, except for Section 2 Seventh, are reproduced in the appendix to the C&NW Petition at 27a-29a, 31a-34a. Cross-petitioners submit that Section 554 of the Administrative Procedure Act, in particular § 554(e), 5 U.S.C. § 554(e), is relevant to this cross-petition; that statutory provision, along with Section 2 Seventh of the Railway Labor Act, are reproduced in Appendix A to this cross-petition at 1a-4a.

STATEMENT OF THE CASE

This case brings before this Court an ICC decision that has been heavily relied upon by the Commission and by our nation's railroads to support their arguments to this Court in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA* (argued March 29, 1989) that the ICC's power over rail transactions is so pervasive that it supersedes any federal statute which may impede the railroads from placing into effect a rail transaction which the Commission has exempted from regulation under the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* In their petition in No. 88-1706, petitioners C&NW and FRVR are asking this Court to review the Eighth Circuit's conclusion that the Interstate Commerce Act does not override the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and does not restore to the federal courts jurisdiction which Section 4 of that anti-injunction Act has withdrawn to enjoin strikes. By this cross-petition, RLEA and the UTU submit that if this Court grants the petition in No. 88-1706, it should also review the underlying question of whether the Commission or the court of appeals had jurisdiction to issue a declaratory order con-

cerning the impact of ICC orders on other federal statutes. Cross-petitioners are also asking this Court, if the C&NW and FRVR petition is granted, and if this Court concludes that either the ICC or the appellate court had jurisdiction to consider the conflict of laws issues, to review the Eighth Circuit's conclusion that the Interstate Commerce Act supersedes the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

STATEMENT OF FACTS

This case began with a petition that the C&NW and FRVR filed with the Commission on December 23, 1987, asking that agency to issue an order "clarifying" the impact that its exemption orders under 49 U.S.C. § 10505 have on both the Railway Labor Act and the Norris-LaGuardia Act.[2] RLEA opposed that request by arguing that the Commission lacked jurisdiction to issue such a declaratory order. Appendix in 8th Cir. No. 88-1280 at 96. RLEA also contested the merits of the C&NW's and FRVR's position. *Id.*

On January 29, 1988, the Commission issued a decision, with two of its five members dissenting, granting the

[2] Petitioners C&NW and FRVR argued that this petition presented a live controversy because rail labor was asserting that the ICC's exemption order which relieved FRVR from the requirements of 49 U.S.C. § 10901 before it purchased a line of railroad from the C&NW, did not relieve the C&NW of its Railway Labor Act obligations and did not give the federal courts jurisdiction to enjoin a strike due to such a sale without bargaining. Petitioners C&NW and FRVR asserted that the ICC ought to clarify these issues since the Third Circuit had issued a decision that concluded that the ICC's jurisdiction did not override the Norris-LaGuardia Act—*i.e.*, *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *cert. granted*, No. 87-1589 (Nov. 28, 1988). On January 19, 1988, the C&NW filed a complaint with the United States District Court for the Northern District of Illinois seeking similar and other declaratory relief, and an injunction. That suit is still pending, but resulted in a preliminary injunction against rail labor which was before this Court in No. 88-464, *RLEA v. C&NW*, *cert. denied* (Nov. 28, 1988).

C&NW's and FRVR's "petition to clarify" by stating "this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads." C&NW Petition at 4a. Rail labor's contention that the ICC lacked jurisdiction to decide whether federal statutes over which it had no jurisdiction were superseded by its orders, was rejected by the Commission for the following reasons (C&NW Petition at 11a-12a; footnote omitted):

> It seems beyond question that the Commission has the authority to issue declaratory opinions. RLEA does not directly address this authority [*i.e.*, 5 U.S.C. § 554(e)], arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

Turning then to the merits of the petition, the Commission stated that the "broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission." C&NW Petition at 14a-15a.

Reasoning that it had exclusive and plenary jurisdiction over rail consolidations, sales and abandonments, the Commission opined that its orders "preempted" labor legislation "to the limited extent necessary to remove obstacles to Commission approved transactions." *Id.* at 17a. Such obstacles included the Railway Labor Act and the Norris-LaGuardia Act. *Id.*

RLEA asked the Eighth Circuit to review that decision, and on November 21, 1988, the appellate court issued its decision, with one member of the panel concurring and dissenting. All three members of the panel agreed that it "is for *this Court* [*i.e.*, the court of appeals], not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act . . . ." C&NW Petition at 2a-3a (emphasis added). However, the court of appeals went further and, relying upon its decision in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir.), *cert. denied sub nom. ICC v. UTU*, No. 88-711 (Nov. 28, 1988), stated that it "adhere[d] to our decision on these questions [*i.e.*, relationship of transportation statute to both Railway Labor Act and Norris-LaGuardia Act] in *Burlington Northern*." C&NW Petition at 3a. Judge Fagg, in his dissent, "adhere[d]" to his dissent in *Burlington Northern* on the Norris-LaGuardia Act question. *Id.*

Although it held that the Commission lacked jurisdiction to decide whether the two labor statutes were superseded by the Interstate Commerce Act (C&NW Petition at 2a-3a), the Eighth Circuit's judgment stated that the decision of the ICC "is affirmed as clarified by this Court." C&NW Petition at 24a. That judgment then added (*id.* at 24a-25a; emphasis added):

> *This Court*, not the Commission, has ultimate authority to decide to what extent the statutes involved

in this case are to be accommodated to one another in accordance with the opinion of this Court.

RLEA asked the panel to rehear this case since, in rail labor's opinion, the judgment was inconsistent with the opinion. RLEA argued that once the appellate court concluded that the ICC was without authority to issue the decision, the court should have vacated the ICC's decision and remanded with instructions to dismiss the petition for lack of jurisdiction. RLEA Petition For Rehearing at 4-5. On January 30, 1989, the court of appeals entered an order denying RLEA's petition for rehearing. C&NW Petition at 26a.

REASONS FOR GRANTING THE WRIT

1. Rail labor respectfully submits that the substantive issues presented by both the petition in No. 88-1706 and this cross-petition clearly warrant review by this Court. Indeed, that conclusion is inescapable in light of this Court's decision to review the Third Circuit's decisions in *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *cert. granted* in No. 87-1589 (Nov. 28, 1988), and *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *cert. granted* in No. 87-1888 (Nov. 28, 1988), and to hold several other similar cases [3] in abeyance pending the outcome of the *P&LE* cases, which were argued on March 29, 1989. This Court's decision in the first *P&LE* case (No. 87-1589) should decide the Norris-LaGuardia Act accommodation issue which petitioners C&NW and FRVR are asking this Court to review by their petition in No. 88-1706. Also, the Railway Labor Act-Interstate Commerce Act relationship, which is raised by this cross-petition, should be decided either in the second *P&LE* case (No. 87-1888) or by the manner in which this Court resolves rail labor's

[3] Those cases involved the Interstate Commerce Act's relationship to the Railway Labor Act and its enforceability; they are listed in footnote 4 of the C&NW Petition at 5.

petition for a writ of certiorari in No. 87-2049, *RLEA v. C&NW*, which is one of the cases being held in abeyance pending a decision in the *P&LE* cases.

Rail labor submits that the propriety of review is also apparent from *RLEA v. C&NW*, which, like the decision involved in this cross-petition, presents a situation where the Eighth Circuit held that the Interstate Commerce Act supersedes the Railway Labor Act in short-line sale cases exempted from ICC regulation under *Ex Parte 392*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table). As occurred in this case, in the *C&NW* case the Eighth Circuit relied upon its decision in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir.), *cert. denied sub nom. ICC v. UTU*, No. 88-711 (Nov. 28, 1988), to support its conclusion that the transportation statute superseded the Railway Labor Act. Since C&NW asserted that the issues in *RLEA v. C&NW* merited review by this Court (*see*, C&NW Brief in No. 87-2049), it logically follows that the carrier should take a similar position in this case with respect to the same substantive issue.

In short, just as petitioners C&NW and FRVR assert that the Norris-LaGuardia Act issue presented by this case is important and should be resolved by this Court, rail labor also asserts that the substantive issue concerning the relationship between the Interstate Commerce Act and the Railway Labor Act is important and urgently needs to be addressed by this Court. Nevertheless, this Court is currently addressing those issues in the *P&LE* cases and, at present, there does not appear to be a need to grant full review of those issues in this case. Rather, rail labor respectfully suggests, this Court should hold this case (including both the C&NW Petition and this cross-petition) in abeyance pending this Court's ruling in the *P&LE* cases and then apply those decisions to the Eighth Circuit's substantive rulings in this case.

2. Unlike the other cases pending before this Court, this case does not present either the Norris-LaGuardia Act accommodation question or the Railway Labor Act implied repeal question in a factual setting where the lower court's jurisdiction to reach those issues was clear. Indeed, as rail labor has asserted below, the underlying issue presented by this case is whether the ICC and, *a fortiori*, the Eighth Circuit had jurisdiction to reach the merits of the accommodation/implied repeal issues. If, as rail labor asserts is the case, the ICC did not have jurisdiction to issue the declaratory order, then the court of appeals, which had jurisdiction *solely* to review that agency order (28 U.S.C. §§ 2321(a) and 2341, *et seq.*), did not have *original* jurisdiction to issue its own declaratory order. Rail labor respectfully submits that the resolution of this jurisdictional issue, on its own, merits review by this Court.

In this case, petitioners C&NW and FRVR asked the ICC to "clarify" the impact that the agency's rail exemption would have on the jurisdiction of the federal courts to enjoin a strike arising from the implementation of such an exempt sale, notwithstanding Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104. Also, petitioners asked the ICC to clarify whether a sale exemption order, issued under Section 10505 of the Interstate Commerce Act, 49 U.S.C. § 10505, operated to relieve the C&NW of whatever notice, bargaining and status quo obligations might have been imposed upon it by the Railway Labor Act. While the ICC gladly expressed its opinion as to the impact of its orders on those other laws, the Eighth Circuit subsequently held that the ICC had no such authority. C&NW Petition at 2a-3a.

That conclusion by the appellate court is clearly correct, for the C&NW and FRVR were not asking the ICC to interpret or to apply the Interstate Commerce Act. Rather, those carriers were asking the ICC to decide, in the Norris-LaGuardia Act situation, the jurisdiction of

federal courts, and, in the Railway Labor Act situation, the obligation of the C&NW under a federal statute over which the ICC had no jurisdiction. However, even in a situation where the Interstate Commerce Act expressly provides that an ICC consolidation order—a type of order not involved here—relieves a carrier participating in such an approved transaction "from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction" (49 U.S.C. § 11341 (a)), the ICC does not have either the duty or the authority to enforce or to construe those other laws. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88 (1944). Consequently, the ICC should not have that authority here—a case where there is no express immunity.

McLean Trucking does not stand alone, for four members of this Court recently addressed that issue and asserted that a conclusion that the ICC had the obligation to determine whether its orders superseded other laws "was based on a misunderstanding of § 11341." *ICC v. BLE*, 482 U.S. 270, 298 (1987) (Stevens, J., concurring). As Justice Stevens explained, Section 11341(a) is self-executing (482 U.S. at 299), and it is the tribunal called upon to enforce the "other law" that has the responsibility of determining whether the immunity actually applies. 482 U.S. at 300 n.13. This is clearly a correct statement of the law. *E.g., Schwabacher v. United States*, 334 U.S. 182 (1948).

Since the ICC lacks the authority to determine whether its orders do in fact override other laws in cases where the Interstate Commerce Act specifically immunizes a carrier from any restraining or prohibitory law to the extent necessary to enable that carrier to carry out the approved transaction, it logically follows that the ICC certainly does not have that authority where the agency infers the existence of such a limited immunity from its general jurisdiction over rail economic transactions.

In this case, the ICC sought to overlook this lack of jurisdiction by asserting that Section 554(e) of the Ad-

ministrative Procedure Act, 5 U.S.C. § 554(e),[4] gave it "the authority to issue declaratory opinions." C&NW Petition at 11a. But, in relying upon that statute, the Commission ignored the fact that "§ 554(e) does not allow an agency to issue a declaratory order on any subject matter; there must be some underlying authority." *Illinois Terminal R.R. v. ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982). This means that the ICC would first have to have jurisdiction to decide the underlying controversy before it could issue a declaratory opinion on the controversy. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 372 n.3 (1969). No such jurisdiction over the underlying controversy exists in the ICC. Thus, before this Court addresses the substantive issue presented by the petition in No. 88-1706 or the conflict of laws question presented by this cross-petition, the underlying jurisdictional issue should be addressed.

In this case, the court of appeals agreed with rail labor that the ICC lacked jurisdiction to decide the substantive issues, but it then concluded that it—the appellate court—had jurisdiction to decide those substantive issues, and proceeded to determine the "controversy." Rail labor respectfully submits that the appellate court's conversion of a petition for review under the Hobbs Administrative Orders Review Act (*i.e.*, 28 U.S.C. § 2341, *et seq.*) into an original proceeding for a declaratory judgment was such a clear departure from judicial norms as to call for an exercise of this Court's power of supervision over the lower federal courts. Rule 17.1(a), Rules of This Court.

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[4] 5 U.S.C. § 554(e) provides as follows:

> The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

CONCLUSION

Cross-petitioners RLEA and UTU respectfully submit that if the petition in No. 88-1706 is granted, this Court should grant this cross-petition, vacate the judgment of the Eighth Circuit and remand with instructions for the ICC to dismiss the underlying petition by C&NW and FRVR for lack of jurisdiction.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
RICHARD S. EDELMAN

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Cross-Petitioners

* Counsel of Record

Date: May 19, 1989

APPENDICES

APPENDIX A

Statutes Relied Upon

I. Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* (Excerpts)

A. Section 554, 5 U.S.C. § 554

II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 Seventh, 45 U.S.C. § 152 Seventh

I. Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* (Excerpts)

A. Section 554, 5 U.S.C. § 554

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [an] administrative law judge appointed under section 3105 of this title.

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had

for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 Seventh, 45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

APPENDIX B

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Brotherhood of Maintenance of Way Employes;

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications International Union (TCU).

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INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, CROSS-RESPONDENTS

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM OF CROSS-RESPONDENT INTERSTATE COMMERCE COMMISSION

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423
(202) 275-1851

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1874

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, CROSS-RESPONDENTS

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM OF CROSS-RESPONDENT INTERSTATE COMMERCE COMMISSION

STATEMENT

Cross-Respondent Interstate Commerce Commission ("Commission") respectfully submits that the cross-petition filed by Railway Labor Executives Association ("RLEA") and United Transportation Union ("UTU") in Docket No. 88-1874 further supports a grant of the petition for a Writ of Certiorari filed by Chicago & North Western Transportation Company ("C&NW") and FRVR

Corporation ("FRVR") in Docket No. 88-1706. However, the Commission urges the Court to grant the petition in Docket No. 88-1706 rather than that of cross-petitioners.

Docket No. 88-1706, as well as other petitions now before the Court, presents the issue of whether Commission authorization of the disposition of rail property results in displacement by the Interstate Commerce Act (ICA) of the Railway Labor Act (RLA) or the Norris-LaGuardia Act (NLGA) as the mechanism for resolving labor disputes arising in the course of implementing the Commission authorized transaction. Also, the Court held oral argument on March 29, 1989, in two cases involving the identical issues. *Pittsburgh & Lake Erie R.R. Co. v. RLEA,* Nos. 87-1589 and 87-1888. (Our support of the petition in Docket No. 88-1706 is premised on the assumption that the Court has not decided those issues). The cross-petition, however, raises an additional issue—the issue of an agency's supposed lack of jurisdiction to opine upon the limits of its own statutory authority—that neither merits the attention of this Court nor is necessary to the resolution of the principal issues raised by all parties to these proceedings.

1. There are no significant differences among the facts of the case as presented by petitioners and cross-petitioners. Briefly, the facts are as follows:

C&NW and FRVR entered into an agreement for C&NW to sell and FRVR to buy a line of railroad known as "Duck Creek South" pursuant to 49 U.S.C. 10901. Under this section of the ICA the Commission promulgated the procedures in Ex Parte 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (mem.) (*Ex Parte 392*"). *Ex Parte 392* authorizes the sale of such lines via an exemp-

tion from the statutory provisions governing the sale of rail property to new entrants into the railroad industry. The procedures protect the interests of any opposition to the transaction through the mechanism of the filing of a petiton to revoke the exemption.

C&NW and FRVR filed an exemption notice accompanied by a "petition for clarification" asking the Commission to clarify its view as to the "agency's exclusive jurisdiction over labor issues arising out of ICC authorized transactions." RLEA filed a petition to revoke the exemption and opposed the petition for clarification.

The Commission served a decision responding to the petition for clarification, Finance Docket No. 31205, *FRVR Corporation-Exemption, Aquisition and Operation-Certain Lines of Chicago and North Western Transportation Company-Petition for Clarification* (served January 29, 1988). There the Commission expressed its view that the ICA grants the Commission exclusive and plenary authority to authorize certain transactions that of necessity encompasses the authority to resolve any labor disputes that would act as obstacles to the consummation of the transaction authorized by the Commission. RLEA filed a petition for review of this decision with the Eighth Circuit Court of Appeals. (*RLEA v. ICC*, No. 88-1280). In its petition RLEA asserted that the Commission lacked the authority to issue any decision on the question of the ICA's relationship to any other law but that if the Commission possessed such authority its decision was incorrect on the merits.

An Eighth Circuit panel unanimously upheld the Commission's right to issue the order under review, but held that the Courts and not the Commission were the final arbiters of the reach of the Commission's jurisdiction. *RLEA v. ICC*, 861 F.2d 1082 (8th Cir. 1988). In so doing, it relied upon a prior decision holding that the RLA must

be accommodated to the Commission's "authority to supervise and implement labor protective conditions in terms of sales, acquisitions and abandonments . . . insofar as this authority is necessary to assure fair wages and working conditions". 861 F.2d 1083, quoting, *Burlington Northern R.R. Co. v. United Transportation Union*, 848 F.2d 856, 864 (8th Cir. 1988) (Fagg, dissenting). The majority of a divided panel, failed to uphold a comparable accommodation of the NLGA to the ICA for the reasons set forth in the prior decision and Judge Fagg reiterated his dissent. These issues are before the court in the petition filed by C&NW and supported by the Commission.

2. It is clear that all parties agree that the issues presented by the C&NW petition (No. 88-1706) are extremely important to the entire rail industry and to the administration of the ICA, RLA and the NLGA. (See, for example, Commission brief in No. 88-1706, p. *9*; Brief of United States As Amicus Curiae in Nos. 87-1589 and 87-1888). However, the instant cross-petition while raising these vital issues, also raises a non issue, the Commission's supposed lack of jurisdiction to render a declaratory order clarifying the provisions of the statute it is charged with enforcing.

In its attempt to put this issue before the Court RLEA first misconstrues the holding of the court below by contending that the Commission was held to be without authority to issue the challenged order. This is not so. Rather, the Eighth Circuit panel found the courts to be the ultimate authority on questions of the accommodation of the RLA and NLGA to the ICA. 861 F.2d at 1083. An unexceptional formulation of a basic principle with which the Commission has no quarrel. That however, is a far cry from RLEA's position that the agency is without jurisdiction to issue a declaratory order interpreting the statute it is charged with enforcing should that interpretation in

anyway involve another statute. (Cross-petition, p. 10). RLEA's argument is meritless.

To arrive at its extraordindary position RLEA misconstrues several of this Court's precedents. Most egregiously, cross-petitioners misuse *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), (*McLean*) to support the position that if the Commission has no authority to enforce other laws (*i.e.*, RLA and NLGA) it cannot issue any order construing its statutory authority in light of other statutes. *McLean* does not support RLEA. Indeed, *McLean* supports the Commission's view of its ability to issue declaratory orders that touch upon other statutes.

> Congress has vested . . . ICC with broad discretion and has charged them with the duty to execute stated and specific statutory policies. . . . The Commission's task is to enforce the ICA and other legislation which deals specifically with transportation facilities and problems. . . . But in executing those policies the Commission may be faced *with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true it cannot without more ignore the latter. The precise adjustments it must make, however, will vary . . . depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily . . . concerned.* 321 U.S. at 80. (Emphasis added).

McLean is clear authority that an administrative agency, faced with inconsistent or overlapping legislation, has a duty to deliberate and arrive at a reasoned decision with respect to the relative positions of the statutes in question. RLEA denies the existence of such a right.

Moreover, RLEA's position is inconsistent with the decision of this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (*Chevron*). This Court has long upheld agencies' construction of their jurisdiction or statutory authority and held that the agency should be afforded the opportunity initially to construe its governing statutes. As long as the construction of the agency is reasonable the court defers to the agency's reading of the statute. See, the numerous decisions of this Court collected in Mr. Justice Scalia's concurring opinion in *Mississippi Power & Light Company v. Mississippi, Ex. Rel. Moore*, 108 S.Ct. 2428 (1988). RLEA would eliminate this settled practice.

In place of the settled practice of Congress leaving to the agency resolution of ambiguities with respect to its jurisdiction, *Cf. Chevron, supra* at 843-844, with review of the agency decision lodged in the courts of appeals, RLEA champions an approach that would result in chaos. Not only would an agency not have any authority to construe the statute it is charged with enforcing but also the courts of appeals would not have jurisdiction to decide the issue (Cross-petition, p. 11). How the matter would be resolved is not clear, but, in any event, does not merit the consideration of this Court.

CONCLUSION

Cross-Respondent Interstate Commerce Commission respectfully requests that the cross-petition in No. 88-1874 be denied. The petition in Docket No. 88-1706 should be granted and held in abeyance for disposition in light of the Court's disposition of Docket Nos. 87-1589 and 87-1888.

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423
Attorneys for Cross-Respondents
(202) 275-1851

DATE: JUNE 12, 1989

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v.

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CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1988

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CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, ET AL., PETITIONERS

v.

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MEMORANDUM FOR THE UNITED STATES

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1. The Chicago & North Western Transportation Company (C&NW) and the FRVR Corporation (FRVR) are, respectively, the seller and purchaser of a rail line. The Interstate Commerce Commission (ICC) authorized their transaction, pursuant to the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, through the ICC's "*Ex parte*

No. 392" procedures.[1] Shortly thereafter, C&NW and FRVR filed a petition with the ICC seeking a declaratory order "clarifying" the ICC's jurisdiction over labor issues arising from the transaction, including whether its authorization of the transaction "displaces" the collective bargaining provisions of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, and the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* (Pet. 3). The Railway Labor Executives' Association (RLEA), which represents various railway labor interests, opposed the petition.

The ICC issued a decision essentially declaring that the Interstate Commerce Act preempts the provisions of the Railway Labor Act and the Norris-LaGuardia Act to the extent necessary to allow the parties to consummate an ICC-authorized transaction. Pet. App. 4a-23a. See *id.* at 14a-17a, 18a. The RLEA then sought judicial review of the ICC's order in the court of appeals pursuant to the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (also known as the Hobbs Act). The United States, which is a statutory respondent in such cases (see 28 U.S.C. 2344, 2348), filed a statement indicating that it neither supported nor opposed the ICC order under review.

The court of appeals held that "it is for this Court, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under

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[1] See *Ex parte No. 392 (Sub. No. 1)—Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

section 10901 of the Interstate Commerce Act" (Pet. App. 2a-3a). The court explained that it had recently issued a decision holding that "while the Railway Labor Act must be accommodated" to the ICC's authority to impose labor protective conditions, "there is 'no inherent incompatibility' between the recent deregulatory efforts of Congress and the ICC and the continued viability of the Norris-LaGuardia Act" (*id.* at 2a). See *Burlington Northern R.R.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir.), cert. denied, 109 S. Ct. 499 (1988). The court of appeals accordingly affirmed the ICC's decision, but only to the extent that the decision was consistent with the court's prior opinion. See Pet. App. 2a-3a, 24a-25a.

2. C&NW and FRVR petition this Court for a writ of certiorari to review the court of appeals' ruling that the ICC's authorization of a rail line acquisition does not relieve the courts of the provisions of the Norris-LaGuardia Act prohibiting injunctions in cases involving labor disputes. Their petition presents a question that is identical to the question presented in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, No. 87-1589 (argued Mar. 29, 1989). We accordingly submit that the petition and RLEA's related cross-petition should be held and disposed of in light of this Court's resolution of *Pittsburgh & Lake Erie R.R.*, *supra*.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JUNE 1989

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No. 88-1874

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ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423
Attorneys for Cross-Respondents
(202) 275-1851

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